

NORTHWEST ENVIRONMENTAL ADVOCATES



June 1, 2017

FREEDOM OF INFORMATION ACT REQUEST

Patrick McLoughlin
National FOIA/PA Officer
United States Department of Agriculture
Natural Resources Conservation Service
375 Jackson St., Suite 600
St. Paul, MN 55101

Via email only: Patrick.mcloughlin@wdc.usda.gov

Re: **Washington Treaty Tribes "Treaty Rights at Risk" Process**

Dear Mr. McLoughlin:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA).

NWEA is a non-profit environmental watchdog organization dedicated to preserving and protecting natural resources in the Pacific Northwest. NWEA works through education, advocacy, and litigation to protect and restore water in Washington, Idaho, and Oregon and the nation. The organization has a long history of interest and involvement in environmental issues in the Northwest, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This FOIA request concerns matters pertaining to control of polluted runoff from agriculture in Washington State. This request also pertains to the involvement of the Natural Resources Conservation Service (NRCS), an agency of the U.S. Department of Agriculture (USDA), in a process termed "Treaty Rights at Risk." The Treaty Rights at Risk process was triggered by the issuance of a report by the Treaty Indian Tribes in Western Washington entitled *Treaty Rights At Risk: Ongoing Habitat Loss, the Decline of the Salmon Resource, and Recommendations for Change* (July 14, 2011). (This document can be found at <http://nwifc.org/downloads/whitepaper628finalpdf.pdf>.) State Conservationist Roylene Rides at the Door represented NRCS in this process.

I. FOIA Request

In answering this request, please consider "documents" to include but not be limited by: letters, reports, memoranda, internal and external correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, summaries of conversations and interviews, computer records, and other forms of written communication, including internal staff memoranda. In your response, please identify which documents correspond to which requests below. This request also covers any non-identical duplicates of records that by reason of

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notation, attachment, or other alteration or supplement include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

We emphasize that this request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide all documents prepared or utilized by, in the possession of, or routed through the NRCS related to:

1. A letter from Maia D. Bellon, Director, Washington Department of Ecology, to Astor Boozer, NRCS, Re: *Update of Field Office Technical Guide (FOTG) 590 for Nutrient Management* (May 9, 2014) including any response or non-response to the letter, development of the negotiated FOTG 590, and the NRCS decision to withdraw the negotiated FOTG 590 for Washington State. This letter is attached for your convenience.
2. The issuance of a letter from William W. Stelle, Jr., Regional Administrator, National Marine Fisheries Service Northwest Region, to Roylene Rides at the Door, NRCS, and Dennis McLerran, EPA Region 10 (Jan. 10, 2013). This letter and its attachments are provided for your convenience.
3. The Treaty Rights at Risk process from July 14, 2011 to the present including but not limited to the development of the *Puget Sound Region Federal Agency Action Plan* (May 3, 2012), NRCS's Puget Sound Salmon Recovery Partnership, and the so-called "three directors talks." For reference, the Action Plan is attached.

If there are large documents that you suspect we may already have, please feel free to call us and ask, in order to avoid waste or delay. If there are any other materials or categories of materials subject to this request that you do not believe we would find useful, please contact us to discuss a possible narrowing of this request.

II. Fee Waiver Request

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii).

A. Whether the subject of the requested records concerns “the operations or activities of the government.”

This request concerns the role of the NRCS in responding to requests from state and tribal governments regarding agricultural runoff. At this time, there are only a few documents available to the public, leaving unclear how the NRCS has, in fact, responded or even if it has responded. This request concerns the “the operations or activities of the government” because it concerns the NRCS’s use of federal funds and policies to enhance water quality in Washington State. Therefore, this fee waiver request involves records that are readily identifiable as limited to “the operations or activities of the government,” specifically in this instance the operations and activities of the NRCS.

B. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.

The NRCS was one of three federal agencies to take a lead role in responding to requests from tribes and tribal entities. In addition, the NRCS provides technical information about conservation of soil and water to land owners and others in Washington State to help manage natural resources in a sustainable manner. What NRCS considers to be sustainable is of considerable public interest because, as a recent Gallup poll has demonstrated, the American public is very concerned about water quality. Understanding what the NRCS thinks is necessary to protect water quality from agricultural runoff in Washington State, as will be demonstrated by release of the requested records, will most certainly contribute to an understanding of the NRCS and USDA policies on such issues as the desirability of riparian buffers. It will also demonstrate whether different agencies within the federal government are working together or not and will provide information on the technical basis for NRCS policies. Finally, it will provide information on the degree to which the NRCS is helping or hindering Washington state agencies in achieving their water quality goals.

In order that NWEA may evaluate how the NRCS is or is not supporting the efforts of tribes, state government, and other federal agencies, NWEA needs access to the records that demonstrate the NRCS policies, technical views, and strategies. This will assist NWEA in evaluating whether the NRCS’s actions and inactions are consistent with governing statutes and policies and in the public interest. For this reason, reviewing records of the NRCS’s actions and rationale will be “meaningfully informative” and therefore likely to contribute to a public understanding of the role played by the NRCS in responding to state and tribal requests.

C. Whether disclosure of the requested information will contribute to “public understanding.”

Disclosure of the requested records to NWEA will contribute to public understanding because the organization has expertise in the subject area of the records, an intention to disseminate the information obtained, and the connections with organizations and individuals in Washington State that are most likely to use the information contained within the records. NWEA has a track record of working with citizens and journalists across the country in understanding federal laws, programs, and policies. NWEA is known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is tribal, environmental, and fishing organizations, and regulated dischargers that are ultimately at risk if agricultural runoff is not adequately controlled. In

addition, NWEA often shares similar information with state agencies, federal employees, and tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share records as well as information analyzed from records with this same list of interest holders. For example, the treaty tribes continue to show great interest in protecting water quality, in particular from agricultural runoff. *See, e.g.,* WhatsUpstream.com. In future, analysis of these records will be provided to the public.

In addition to using personal contacts and networks with environmental organizations across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means: through the internet from its website, through commentary to the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, and through formal public comments and other formal documents prepared for agencies. For example, NWEA has written comments on Washington's nonpoint source plan and participated in the development of a process by which the state will develop best management practices for agriculture. NWEA has also brought suit against two federal agencies for failing to ensure that Washington has a viable nonpoint source control program.

NWEA's investigation and evaluation of the records will be made available to other parties after it has been completed. NWEA will use the records requested to evaluate the quality of NRCS decision-making and its consistency with other federal agencies. For example, as part of the Treaty Rights at Risk process, other federal agencies have taken positions on needed riparian buffers for agricultural lands. Yet the public has no information about how the NRCS views those buffers. NWEA's dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of NRCS policies insofar as they affect the use of public funds, the dissemination of technical advice, and protection of natural resources. Thus, the release of these records will significantly contribute to the public's understanding and oversight of the NRCS.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in regulatory processes that take place under federal statutes including the Coastal Zone Act Reauthorization Amendments, Endangered Species Act, the Clean Water Act and state laws and programs that are related to meeting the goals of those federal laws (e.g., farm practice laws and programs). NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations concerned about water quality and agricultural runoff through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through its website.

D. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

Courts have held that the factor of whether the disclosure will contribute "significantly" to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government's activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at *8 (D.D.C. 1998). Most of the requested information has not, to the best of NWEA's knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass'n v. U.S.*

Dept. of Interior, 24 F. Supp. 2d 1088, 1095 (D. Ore. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver).

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors' statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver Therefore, in light of [Western Watersheds Project's] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM's position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress' intent to have the fee waiver liberally construed.

Western Watersheds Project v. BLM, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a "close call" as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians v. Dept. of the Interior*, 416 F. 3d 1173 (10th Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM*, 402 F. Supp 82 (2005) held that an organization's statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, when the records concern agency inaction, a court has found that a requestor's statements concerning the agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of the NRCS. In general, nothing short of seeing the documents can be sufficient to establish whether the NRCS is acting in the public interest to preserve natural resources. Only by understanding the basis for NRCS policies and how the NRCS has worked with other federal, state, and tribal governments can NWEA meaningfully participate in its public oversight watchdog function. NWEA will also disseminate the information to organizations its works with across the country through listserves, websites, meetings, memoranda, and direct sharing of the records. This issue is of interest to journalists who have covered water quality protection issues and to the general public, which has demonstrated a keen interest and concern about water quality.

E. Commercial interests.

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g., VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002)(VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. And, NWEA has no vested interest in NRCS policies. Rather, NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Northwest and across the country. Therefore, the considerations of 40 C.F.R. 2.107(l)(1) with regard to the possible commercial interests of NWEA do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request.

We look forward to your response. Please feel free to contact me at 503/295-0490 or nbell@advocates-nwea.org if you have any questions about how to respond to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell", with a stylized, flowing script.

Nina Bell
Executive Director



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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May 9, 2014

Mr. Astor Boozer
Natural Resources Conservation Service
14th and Independence Avenue SW
Room 5204-S
Washington, DC 20250

RE: Update of Field Office Technical Guide (FOTG) 590 for Nutrient Management

Dear Mr. Boozer:

I am writing to express my disappointment with the National Resources Conservation Service's (NRCS's) process to update the Washington State Nutrient Management Standard (590). As you are aware, the Washington State Department of Ecology (Ecology) is the water quality authority for Washington State. Ecology administers the state's Water Pollution Control Act, and is delegated by the U.S. Environmental Protection Agency (EPA) as the state water pollution control agency responsible for implementing all federal water pollution control laws and regulations. We are also one of the agencies responsible for addressing nitrate groundwater pollution issues in our state and ensuring that bacteria water pollution is addressed. Our work with NRCS to update the 590 standard has been a priority.

As you know, the nationally issued FOTG 590 requires NRCS to obtain concurrence from the state water quality authority for certain aspects of the practice. At your agency's request, we assigned a senior staff person who worked with Washington State NRCS staff for over two years to construct a 590 practice with which Ecology could concur. This practice was finalized and posted on the NRCS web site. However, the practice was withdrawn by NRCS, and Ecology was told that the national NRCS office had decided not to accept the winter manure application section of Washington's new 590 practice.

Ecology has not been informed of the specific reasons why Washington's new 590 practice was not accepted by national NRCS. We have also not been given any explanation of what was "misinterpreted" by state NRCS. Finally, we have heard nothing from NRCS about what alternative process is being proposed to move forward with producing a revised 590 practice for Washington. We continue to be concerned about winter manure application.

This leaves my agency in an awkward position. We were excited to be able to work closely with NRCS to produce a revised 590 practice designed to better protect water quality in Washington. We were also gratified that NRCS, at a national level, recognized the importance of including



Mr. Astor Boozer
May 9, 2014
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state water quality agencies in the revision of the 590 practice, and required state concurrence for specific parts of the practice. We spent more than two years building relationships with NRCS staff, working to understand NRCS perspectives, and negotiating with NRCS to produce a 590 practice that met the needs of both of our agencies.

Ecology's participation is vital to the production of a revised 590 practice for Washington. We also believe that the requirement for state water quality agency concurrence gives us a very specific role in the process. However, I am not inclined to spend another two years of work only to have our collective product dismissed with little to no explanation. Before NRCS begins any alternative process for production of a revised 590 practice, I request the following:

- A detailed explanation for rejecting the 590 practice previously negotiated.
- An explanation of how NRCS interprets the requirement for state agency concurrence.
- A commitment that NRCS will work with us in good faith to produce a revised 590 practice for Washington (i.e. we would like to meet with NRCS staff to discuss what alternative process will be used and how NRCS intends to work with Ecology and others to produce a revised 590 practice with which Ecology can concur).
- An explanation of what will happen if concurrence is not achieved.

Thank you in advance for your attention to this issue. We look forward to your response. My goal is to forge a good working relationship on this issue. If you have further questions please feel free to contact Kelly Susewind, my special assistant, at (360)-407-6829 or kelly.susewind@ecy.wa.gov.

Sincerely,



Maia D. Bellon
Director

cc: Roylene Rides at the Door, NRCS
Bonda Habets, NRCS
Tracy Hanger, NRCS
Ernie Holt, NRCS
Tom Eaton, EPA
Dennis McLerran, EPA
Wayne Honeycutt, USDA



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

January 30, 2013

RECEIVED

FEB 04 2013

Office Of The Executive

Ms. Roylene Rides-at-the Door
USDA Natural Resources Conservation Service
316 W. Boone Avenue, Suite 450
Spokane, Washington 99201-2348

Mr. Dennis McLerran, Regional Administrator
EPA - Region 10
1200 6th Ave., Suite 900
Seattle, Washington 98101

Dear Ms. Rides-at-the-Door and Mr. McLerran:

Our three agencies have been in very active discussions on opportunities to restore the health of our streams and nearshore areas as part and parcel of our collective effort to address the Treaty rights issues associated with the continuing loss of habitat productivity of importance to salmon and steelhead populations and other fishery resources in the Pacific Northwest. In particular, we have been examining the adequacy of our current approaches to describing those riparian buffers in lower elevation landscapes that may be necessary to protect and restore important aquatic functions.

NOAA Fisheries has recently reviewed the current scientific information associated with this topic in order to assist us in identifying approaches that might help protect aquatic functions important to fishery resources. In this context, I am writing to recommend that you use on an interim basis the enclosed matrix of riparian buffers in programs EPA or the NRCS support or fund. I would also couple this with our request to join with us and others to refine the matrix based on best available science over the coming months. For your information, I have enclosed a brief synopsis of existing scientific information about the relationship between riparian buffers and aquatic stream functions important to Pacific salmonids in the low elevation agricultural landscapes of western Washington which I believe will help provide some meaningful background for our recommendation.

Several factors provide context for our recommendation. Numerous populations of salmon and steelhead in the Pacific Northwest are at risk of extinction and as a consequence, federally-reserved treaty rights to harvest these fish are also at risk. Degradation and loss of freshwater and estuary habitat are significant factors in the decline of these populations. Salmon habitat ranges from the forested areas of the upper elevations to the lower-elevation floodplains to the estuarine and near-shore habitats of Puget Sound. All of these areas provide vital functions in



the system as whole, particularly the lower-elevation and estuarine areas that are the focus of my recommendation. There are many ongoing efforts to rebuild Puget Sound salmon, including those of numerous state and federal agencies, tribal and local governments and the private sector. I am providing the enclosed matrix as NOAA Fisheries' recommendation for minimum riparian buffers in lower-elevation agricultural landscapes. Our technical guidance is intended to help shape recovery and rebuilding efforts effectively and to offer our technical advice on what aquatic functions fish need.

In some cases, our recommendations are framed in terms of ranges of buffer widths rather than point estimates, and expressed as probabilities of achieving desired outcomes. Local conditions and local circumstances matter, and may affect the choice of the riparian buffer most effective at achieving salmon recovery. Nevertheless, the scientific information does support conclusions about the probability of differing buffer ranges to provide a range of aquatic functions that are essential for water quality and salmon needs, as depicted in the enclosures. We are ready to work with project proponents, landowners, agencies, departments and tribes to provide technical advice and find solutions that will support salmon recovery.

The enclosed matrix has its origins in the Washington Agriculture, Fish and Water process (AFW), which occurred from 1999 to 2003 and included participation by state and federal agencies, tribal governments and diverse agricultural interests. One of the efforts undertaken in the AFW process was to identify riparian buffers for agricultural landscapes that provide adequate salmon habitat and are implementable. Several options were developed by the AFW caucuses. For the sake of clarity, the enclosed matrix displays the proposal developed by the federal caucus at the request of the AFW Executive Committee, Option 3. It was presented to the Executive Committee by NOAA Fisheries, along with several caveats which still hold true today: 1) there is a technical basis for the buffer table, supported by the refereed literature and other references; 2) it represents a coarse-scale classification; and 3) the goal of the matrix is to meet state and federal water quality standards and improve salmon habitat. NOAA Fisheries explained the numbers are within an advisable range, and stated there is flexibility to implement more complex approaches when looking at specific sites, so long as water quality protection and salmon habitat function are equivalent or better than that provided by our recommendations.

This history is relevant today as our view of the buffer table is unchanged. We supported its use in 2002, and we still support its use in 2012 as a guide for establishing interim minimum buffers for programs to promote good water quality and aquatic conditions important to salmon and other aquatic life. While the table identifies buffers as narrow as 35 feet for limited situations, in most settings buffers will need to be significantly wider than this to meet salmon habitat needs. We recommend protecting wider buffers where they exist and creating wider buffers where it is practicable and where local watershed conditions warrant. Further, we are convinced that any strategy to meaningfully increase the agricultural landscape's contribution to salmon recovery, as well as any strategy to sufficiently protect water quality, should contain a robust riparian restoration program.

If you have any further questions about this letter, please feel free to call me directly or Mr. Steve Landino, the director of our Washington State Habitat Office.

Sincerely,

A handwritten signature in blue ink that reads "William W. Stelle, Jr." in a cursive style.

William W. Stelle, Jr.
Regional Administrator

Enclosures

cc: Puget Sound Federal Caucus Agencies
Northwest Indian Fisheries Commission
Washington State Dept. of Ecology
Washington State Department of Fish and Wildlife
Washington State Department of Natural Resources
Washington State Department of Agriculture
Washington State Department of Health
Washington State Conservation Commission
Washington Recreation and Conservation Office
Puget Sound Partnership

**Interim Riparian Buffer Recommendations for Streams in Puget Sound Agricultural Landscapes
November 2012**

**(Originally proposed as federal Option 3 for the
Agriculture Fish and Water (AFW) Process, March 2002)**

Channel Type	Habitat Functions	Composition	Buffer Width	Comments
Class I Constructed ditches; small non-fish bearing streams	Water quality protection; shade; sediment filtration	Grasses, trees or shrubs; may only need woody vegetation on one side of channel	As wide as necessary to meet water quality standards; can be determined by NRCS Field Office Technical Guide (FOTG)	Channels constructed for purpose of draining farmland. If dredged, dredging should occur when fish are absent or at lowest densities
Class II Fish bearing streams; natural and modified natural watercourses that are incised and cannot move	Water quality; LWD for cover, complexity; litter fall; shade	Site potential vegetation; trees where they will grow	2/3 Site potential tree height; 50 ft. minimum to 180 ft. maximum	Portions of natural watercourses that can no longer migrate laterally
Class III Fish bearing; natural unconfined channels	Same as above, but structural LWD essential	Same as above	3/4 Site potential tree height	Highly desirable to buffer entire channel migration zone (CMZ)
Class IV fish bearing streams confined by dikes or other hardened man- made feature	Water quality; complex cover; litter fall; shade	Trees and shrubs	Face of levee, from top of dike to Ordinary High Water (OHW) mark	
Class V Fish bearing intertidal and estuarine streams and channels	Water quality; food inputs; habitat complexity	Site potential vegetation (salt- tolerant sedges, shrubs, trees)	35-75 ft.; varies according to adjacent land use	

Puget Sound Region Federal Agency Action Plan

In September 2011, the White House Council on Environmental Quality designated the Regional Administrators of the Environmental Protection Agency (EPA) and NOAA Fisheries, and the State Conservationist for USDA's Natural Resource Conservation Service (NRCS) as co-leads for a renewed federal effort to contribute to the protection and restoration of Puget Sound and the Washington coast. This endeavor responds to recent concerns raised by Western Washington Treaty Tribes about continued habitat losses and associated diminishment of fishery resources. Under the leadership of the three co-chairs, federal agencies with authorities in Puget Sound and western Washington coastal river basins are re-focusing existing efforts and working better together to protect and restore habitats important to salmon, shellfish and other species. This improved interagency effort includes a critical review of existing policies, authorities, and funding programs to identify opportunities for strengthening the ability of those programs to contribute to the overall objectives for Puget Sound and Washington coastal habitat restoration. This Action Plan describes the status of this inter-agency approach and highlights key actions agencies are taking. Appendix A provides a detailed description of specific agency commitments, accountability measures, and timeframes for implementation. Our aim is for federal agencies to conserve habitat strategically and effectively for salmon, shellfish and other species in Puget Sound and the coast.

We undertake this as a dynamic plan that will evolve over time as circumstances change. We therefore view this as the first phase of a longer-term effort. We welcome and encourage the full engagement of the many partners in the Puget Sound and coastal challenge, and the recommendations of all on how to improve our contributions to habitat restoration over time.

Strategy and Commitment to Action:

Puget Sound federal agencies agree to: 1) coordinate their programs with one another and with the state and tribes to protect and restore habitat in Puget Sound and the coastal rivers of western Washington. This coordinated approach will help rebuild the health and productivity of the aquatic systems upon which salmon and other species depend and affirm federal commitments to Treaty Tribes of western Washington. 2) coordinate funding to the extent allowed by law. 3) prioritize protection and restoration of shoreline and nearshore habitats, flood plains, and water quality. 4) report progress to CEQ regularly to ensure the initiative results in steady improvements in habitat conservation across the Puget Sound Basin and coastal rivers of western Washington.



Creation of a Tribal-Federal Habitat Forum:

Federal Caucus member agencies will join with Puget Sound and coastal treaty tribes to establish a joint Forum for addressing unresolved priority habitat implementation measures within adopted watershed recovery plans. The Federal Caucus and the Puget Sound and coastal Treaty Tribes each will appoint a co-chair of the Habitat Forum to ensure proper and timely administration of its work. Working on an issue-by-issue basis, the co-chairs will ensure concise description of an impediment to implementation of a habitat measure within a local watershed recovery plan. Further, they will encourage tribal and federal agency policy leaders to assign appropriate staff to collaboratively evaluate the impediment. Staff will resolve the impediment where possible, and prepare a situation summary including options for resolution of any remaining impediment. Co-chairs, in conjunction with the appropriate policy leaders, will establish reasonable timeframes for completion of assignments.

Issue elevation process: The federal co-chair will encourage the appropriate regional federal officials with decision-making authority related to an identified impediment to participate in the Habitat Forum's review of the situation summary and options for resolution. In circumstances where these officials cannot resolve the issue, the co-chairs will determine, in consultation with the Council on Environmental Quality (CEQ), whether elevation through the CEQ to appropriate members of its Assistant Secretary Group is warranted and so notify CEQ. In cases where elevation through CEQ is appropriate, the CEQ-appointed co-chairs (EPA and NOAA Fisheries Regional Administrators and NRCS State Conservationist) of the regional Federal Caucus will be responsible for the elevation. The three co-chairs will assign staff who will work with appropriate tribal officials to refine the situation summary for the three co-chairs' use in seeking resolution through elevation of the issue through CEQ. The Federal Caucus recommends the first meeting of the joint Tribal-Federal Habitat Forum occur before June 30, 2012.

Policy coordination: Federal agencies are identifying existing policies that can be improved or strengthened to facilitate this strategy, and are investigating changing these policies where feasible. We describe below selected policies under federal agency review. Federal agencies will continue to examine existing policies and coordinate with one another and the states and tribes when considering new policies that may affect salmon habitat.

1) Per Corps of Engineers national guidance, all elements of the incidental take statement are included by reference in the Corps permit, and there must be a condition indicating that the applicant must comply with the incidental take statement. Additionally, the permit condition referencing the biological opinion must indicate that the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, will be informed of, and enforce, any known violations of the incidental take statement. NOAA is encouraging the Corps to take a more direct compliance role governing ESA-based terms and conditions. Corps regional staff met with NOAA in December 2011 as part of an ongoing multi-agency discussion about compliance

enforcement to protect and restore Puget Sound habitats, but defers to the national level for any potential change in enforcement policy related to incidental take statements.

2) NOAA is developing new regional guidance on establishing, approving, and using conservation banks that can promote larger scale and more effective mitigation and restoration efforts than might otherwise occur on a permit-by-permit basis. NOAA intends to use selected project consultations to encourage the use of new and existing conservation banks. NOAA will explore opportunities for ensuring these banks can be approved by the Corps for use as compensatory mitigation in Corps permits.

Existing Authorities: Federal agencies will improve their use of existing regulatory authorities and incentive programs to protect and restore salmon habitat. Initially, federal agencies have identified the following uses of existing authorities:

1) The Corps Seattle District will continue to implement the Section 404 Clean Water Act/Section 10 Rivers and Harbors Act Regulatory permit program to avoid, minimize, and mitigate adverse effects on the aquatic environment while allowing reasonable development. The program entails collaboration with the Federal Services (USFWS and NOAA Fisheries), EPA, state agencies, and tribal consultation.

2012 Nationwide Permits (NWP), Regional General Conditions (RGCs), and Regional Conditions (RCs): The Corps Seattle District developed RGCs and RCs for the NWPs published on February 21, 2012, which became effective March 19, 2012. Input from tribes, state agencies, the public, and NOAA Fisheries regional office resulted in strengthened environmental protections and increased rigor of analysis for projects with the potential to impact resources of concern in Puget Sound and statewide, relative to the 2007 versions. Initiatives championed by tribes, while not fully enacted, formed the basis for the following specific actions:

- The use of Standard Individual Permits rather than NWPs for new bank stabilization projects in areas of Puget Sound with high levels of cumulative impacts;
- Limited impacts that could be caused by NWPs for intermittent and ephemeral streams as well as mooring buoys under certain circumstances;
- Additional information requirements allowing a more rigorous review for all bank stabilization projects; and,
- Additional information requirements allowing for more rigorous review of all stream crossing analyses.

The Seattle District will wait for further guidance from Corps Headquarters on implementing the February 15, 2012 NMFS Biological Opinion (BiOp) regarding the NWP program.

2) PL 84-99 Flood Control and Coastal Emergencies Programs: The Corps Seattle District continues to work collaboratively with levee owners, tribes, the federal Services (USFWS and NOAA Fisheries), and stakeholders to develop flood risk management solutions for the Public Law (P.L.) 84-99 Flood Control and Coastal Emergencies (FCCE) programs. These programs

support levee integrity, ESA compliance, and fulfillment of other federal responsibilities. The Corps anticipates the ESA Section 7 consultation inherent in these efforts will yield endangered species/fish-friendly criteria for levee design, construction, maintenance, and repair and best practices guidance for Puget Sound and the region. The District will try to complete P.L. 84-99 consultations with the federal Services prior to doing the actual repairs where circumstances allow, taking into consideration issues such as funding, emergency circumstances and work windows.

a) Levee Vegetation System Wide Improvement Framework (SWIF): The SWIF helps identify solutions that use resources efficiently, prioritize improvements, and take corrective actions based on risk, and better align programs and requirements. The Corps Seattle District will serve as the local federal lead for interagency efforts when the Corps' new SWIF approach is used by levee sponsors.

b) Levee Vegetation Variance Policy Guidance Letter (PGL): The Seattle District will serve as the local federal lead for interagency coordination efforts on variances from mandatory Corps vegetation-management standards. The District will work with levee sponsors (for non-federal levees) and seek their concurrence (for qualifying federal-constructed non-federal sponsor-maintained levees) to request variances under the new DRAFT Vegetation Variance policy. These variances will preserve, protect, and/or enhance natural resources and protect tribal treaty rights, while ensuring levee function.

c) Emergency Flood Response Activities: The Seattle District will seek to improve its method for determining whether local jurisdiction flood assistance requests (Advance Measures and Emergency Operations) will protect against significant threats to life, health, welfare, property, and infrastructure. For example, where emergency action is warranted, the Seattle District will coordinate as early possible with the Federal Services, EPA, and tribes so that the action's scope and implementation avoid or minimize adverse habitat impacts, with appropriate after-the-fact mitigation when impacts do occur.

d) Levee Rehabilitation: The Seattle District will continue to coordinate its post-damage levee repairs with interested federal, state, local, and tribal entities. Where possible, based on federal and non-federal resources and other case-specific conditions, the Corps will consider implementing levee setbacks rather than levee rehabilitation in-place.

3) The Corps Seattle District will continue to implement projects in Puget Sound and Washington coast under its Civil Works program authorities (subject to availability of funding and non-federal sponsor participation) that restore the ecosystem and/or have a positive effect on habitat and comply with the ESA.

4) NOAA and the Corps are promoting alternative materials and installation methods to reduce habitat impacts from bank armoring. NOAA and the Corps will complete a programmatic consultation describing armoring designs that reduce impacts on fish habitat. The Corps will provide this information to permit applicants for use in preparing permit applications and mitigation plans.

5) NOAA is nearing completion of an analysis under Section 7 of the ESA for the reauthorization of a Corps Regional General Permit for residential piers, ramps and floats in marine waters. Related to this analysis, NOAA is developing guidance for analyzing project impacts and calculating mitigation requirements. This guidance will assist agencies and project applicants in accurately assessing the potential habitat impact of proposed projects and will enable the Corps and other federal agencies to establish a crediting mechanism for mitigation banking and in-lieu fee (ILF) programs. These mechanisms provide for high quality compensatory mitigation to offset unavoidable project impacts. Among those ILF programs being developed in concert with the Corps are the first tribal mitigation banks, the first tribal ILF program, and the first marine ILF program.

6) The Federal Emergency Management Agency (FEMA) will work with NOAA and others to review and evaluate the sufficiency of local government responses to address the new salmon-related floodplain habitat requirements of FEMA's National Floodplain Insurance Program (NFIP). Recently completed ESA consultations describe these new requirements. FEMA will seek corrective actions where needed. FEMA will explore opportunities to link with local jurisdictions and other federal agencies to coordinate the use of hazard mitigation projects to reduce flood risk and restore habitat functions and values. This will reduce risk and enhance floodplain productivity.

FEMA now requires all NFIP- participating communities to have an ESA- compliant floodplain management program or face possible suspension from the program. To date, all of the 122 affected communities in the Puget Sound basin have committed to FEMA that they have an ESA compliant program in place. In partnership with the Washington State Department of Ecology, FEMA has begun to prioritize communities for compliance audits (Community Assistance Visits) to ensure all communities are appropriately administering and enforcing their NFIP-ESA commitments pursuant to the NOAA FEMA biological opinion.

7) EPA will enhance water quality by continuing to address water quality priorities including:

- Development of model federal discharge permits (e.g., the Joint Base Lewis McChord efforts to establish appropriate water quality standards and Best Management Practices).
- Agreement between EPA and the Washington Department of Ecology (DOE) on the state's industrial general storm water discharge permit which is up for renewal, including appropriate conservation measures for fish habitat.

- Agreement between EPA and DOE to implement the existing municipal general stormwater discharge permit.
- Any /all of the first three items could include Low Impact Development standards.
- Coordination with the joint agency enforcement team to seek strategic permit compliance/enforcement opportunities.

8) The U.S. Geological Survey (USGS) will convene and lead an interagency in-stream flow working group to undertake the necessary scientific work to quantify the flow requirements of anadromous fish, and other fishery resources, in selected watersheds. The Bureau of Indian Affairs, NOAA, EPA, FWS, and the Forest Service will participate in this interagency working group and contribute their relevant scientific and technical expertise to it.

Enforcement: Federal agencies are coordinating on increased efforts to improve compliance with existing programs to protect salmon habitat in close partnership with their state enforcement partners. NOAA's Office of Law Enforcement, the U.S. Coast Guard, and other federal agencies have joined with their state counterparts to form a subgroup of the Northwest Environmental Crimes Working Group. This Puget Sound and Coastal Habitat Initiative Sub Group is formulating a suite of strategies to promote more effective compliance and enforcement of activities related to the protection and restoration of nearshore habitats, flood plains, and water quality. These strategies include internal training, outreach, directed enforcement, and community collaboration and education into the vital role of these habitats. The federal and state agencies involved have pledged both short- and long-term commitments to this effort.

Funding: Federal agencies will seek to coordinate their ongoing budgeting processes to expand the effective use of available resources to contribute to habitat restoration. As the agencies develop 2014 budgets, federal agencies propose to identify and coordinate major programs that protect and restore Puget Sound habitat in an effort to be efficient and strategic with federal funds. EPA and NOAA will lead an inter-agency review of federal funding and grant programs to identify opportunities to leverage funds and maximize returns on habitat restoration and protection investments. Concurrently, they will identify opportunities to streamline and simplify grant application and reporting requirements, and to adopt criteria for prioritizing grants that are consistent with the joint federal strategy.

To the extent allowed by relevant statutes, federal agencies will explore and focus budgets at the regional level to protect and restore salmon habitat, while still meeting other resource management obligations, and ensure salmon habitat funding is coordinated across fund sources.

1) Corps Seattle District – A significant portion of the Seattle District's Civil Works annual appropriation directly or indirectly affects Puget Sound across seven Civil Works business lines. Fiscal Year 2013 President's Budget request levels released on February 13, 2012 are generally consistent with 2012, while Fiscal Year 2014 budget development begins shortly at the Seattle District and Northwestern Division levels. Nationally, the Corps is developing a future

watershed based budgeting process that considers Corps programs and projects in an integrated water resources management systems approach. The Corps anticipates that this approach will better integrate its actions with those of Tribes, federal, state, and local agencies, and stakeholders.

2) FEMA is a partner in a process with USGS, NOAA Fisheries, the Puget Sound Partnership and the Nature Conservancy to link Stafford Act and NFIP Hazard Mitigation floodway buy-out funding to floodplain and salmon habitat restoration projects. FEMA is providing both past and future buy-out information to the USGS to incorporate into a GIS database to identify priority restoration areas for the Puget Sound basin. FEMA coordinated a meeting between the Nature Conservancy and the Washington State Emergency Management Division to explore state prioritization of hazard mitigation buy-out projects with FEMA funds, to identified habitat restoration areas.

3) The U.S. Fish and Wildlife Service (USFWS) Puget Sound Coastal Program is one of 22 Coastal Programs around the country with the goal of conserving coastal habitats to support fish, wildlife, and plants. The program focuses primarily on habitats that provide benefits to salmon in Puget Sound and the Washington coast. The program contributes funding directly to on-the-ground habitat restoration projects every year. Additionally, funding for this program allows USFWS biologists to provide technical assistance to many ongoing habitat restoration planning efforts, such as the Puget Sound Nearshore Estuarine Restoration Program, that will result in significant benefits to salmon once implemented.

By working with our state partners to develop strong proposals through the National Coastal Wetlands Conservation Grants Program, FWS is contributing significantly to the long-term conservation and restoration of Puget Sound and coastal Washington's marine and estuarine resources. This program's conservation accomplishments directly benefit salmon in Puget Sound and western Washington by contributing funding toward the acquisition and restoration of coastal wetland habitats.

4) The USDA, working through the NRCS and the FSA, will expand significantly its conservation programs related to the protection and restoration of riparian functions and values in support of rebuilding the productivity of important salmon habitats in the riverine systems of Puget Sound and Washington coast. Using existing authorities and the additional financial resources as contained in the 2012 spending plan and the proposed 2013 President's budget, the USDA will team with local conservation districts, local governments and other partners to expand the delivery of its riparian-related ecological services. USDA FSA will implement coordinated investments of its Conservation Reserve Program and other conservation programs in priority watersheds for salmon recovery that have active and involved local partners and Tribes.

NRCS submitted a proposal for a special initiative to focus Farm Bill Conservation Programs on water quality and habitat enhancement in the Puget Sound and Washington coast. This funding would enable NRCS to accelerate technical and financial assistance to private landowners for a variety of activities that will enhance riparian, wetland, floodplain habitats and water quality. The majority of the funding would likely be available through NRCS' Environmental Quality Incentives Program. The funds will be allocated quickly, with all funds being obligated by September 2012. The Federal Caucus agencies are assisting NRCS in identifying priority projects and key habitat areas for funding.

5) The FY12 Puget Sound funding allocation reflects EPA's desire to work with its partners to reverse the trend of habitat loss at the local level and improve salmon and shellfish recovery. This focus on shellfish, salmon and habitat is consistent with the areas that the Puget Sound Partnership focused on in updating the Action Agenda: 1) land development, 2) loss of floodplain function, 3) shoreline alteration, 4) urban stormwater runoff, and 5) wastewater. The funding allocation provides specific resources to address stormwater and its impacts on salmon, shellfish and habitat. Stormwater causes pre-spawning mortality in high percentages of healthy Coho salmon in Seattle creeks within hours of the fish entering those waters. Stormwater is also the primary way that many of the contaminants of concern enter Puget Sound; pollutants like copper have been implicated along with habitat destruction as potentially leading to the poor marine survival rate observed for juvenile salmonids in Puget Sound. In rural areas, stormwater is a major pathway for pathogens entering shellfish beds. Habitat destruction by high stormwater flows will be further exacerbated by climate change.

EPA will work within the existing Lead Organization structure of local, watershed-based groups responsible for salmon recovery, and with Tribes and federal agencies to negotiate and update funding agreement work plans that address shellfish and habitat, as well as other impediments identified in the local salmon recovery plans. EPA will further work with Lead Organizations to incorporate these areas of focus into sub-award decision criteria. In each case, we will work with our grantees to ensure that federal, state, tribal and local authorities and activities are aligned and consistent with salmon recovery plans.

Science, Monitoring and Research: Several federal agencies possess significant scientific, monitoring and research capabilities that are relevant to resolving the complex challenges of restoring Puget Sound and the Washington coast. Federal agencies seek to augment existing capabilities through the Puget Sound Science Team and other forums to increase the scientific foundation for monitoring and analysis, and allow for better tracking of progress, setting of priorities and decision-making. Currently, NOAA is developing monitoring, research and modeling approaches to support this Puget Sound and coastal initiative. NOAA's Northwest Fisheries Science Center is refining research and monitoring designs to help managers target protection, restoration and acquisition investments toward the most important recovery actions across Puget Sound and along Washington's coast. In addition, the USDA Forest Service Pacific

Northwest Research Station continues to produce science that improves our understanding of salmon and their habitat.

Communications and Public Engagement: The federal agencies fully recognize that the restoration of Puget Sound and Washington's coast will require a broad-scale, sustained engagement of many governments and the larger community for the long haul. We therefore seek to strengthen and deepen our contributions to a multi-faceted public engagement and communications effort associated with protecting Puget Sound and Washington's coast. The federal agencies seek to coordinate regionally and enhance our individual and collective education and engagement capabilities with those of state, tribal and local governments and the non-governmental sectors in order to effectuate this broader engagement. We are in the early stages of scoping out innovative opportunities for doing so, working with the Puget Sound Partnership and others. We actively seek and encourage the recommendations of our many partners on how to proceed with this effort in a creative manner, employing many of the new communications tools now available to engage and empower.

Additional agency-specific actions: Each federal agency prepared a list of specific commitments and actions for improving salmon habitat and other fishery-related resources in Puget Sound and along Washington's coast. The Federal Agency Matrix (Appendix A) includes the complete list of federal agency actions. This Federal Agency Action Plan, together with the additional commitments in the Matrix describe the suite of actions the federal agencies will take to protect and restore Puget Sound and coastal habitat and respond to the concerns raised by Treaty Tribes in western Washington.

This policy is intended only to improve the internal management of the federal government and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, any federal agency or any person.